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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF BIRMINGHAM, ALABAMA,
Petitioner,
v.
SCOTT THOMAS MORRO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioner City of Birmingham, Alabama, respectfully submits this reply to the Brief in Opposition of Respondent Morro. Morro's arguments should not dissuade this Court from granting review; indeed, having received those arguments this Court is now in a proper position to reverse the judgment below without further ado.

I. THE QUESTIONS PRESENTED IN THE PETITION ARE PROPERLY BEFORE THIS COURT, AND THEY MERIT REVIEW.

Morro's primary argument is an attempt to hide the merits of this case behind not one, but two, layers of avoidance; not only does he say that the City waived the *Monell* issue, but also he says that the City waived the right even to contend that it did not waive the issue. This argument is unavailing. This Court would have the authority to review the issues presented here even if they had

not been presented at all below and had not been decided by the Court of Appeals. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). But exercise of jurisdiction in this case would involve no stretch at all; the issue of whether the City waived the *Monell* issue was the subject of extensive discussion in oral argument before the Court of Appeals, was *the* basis on which the Court of Appeals decided the case, and was again extensively discussed by the City in petition for rehearing by the Court of Appeals. The issue is properly before this Court.

Morro's second approach is that this case involves a mere discretionary exercise of trial court authority to narrow the issues in pretrial proceedings. But the trial court would have had discretion to penalize the City for not raising the *Monell* issue in the pretrial order only *if* it was the City's—rather than Morro's—duty to preserve the issue in that form. In other words, as shown in the Petition, the decision below would be justifiable *only* if the *Monell* issue is a "defense" rather than an element of plaintiff's claim. That question—i.e., whether the *Monell* issue is a "defense" such that it was waived by the City—is the primary one presented by the Petition; and Morro's mere disagreement with the City's argument does not weigh against review.

Morro's third effort is to misdirect this Court's attention, arguing that the City waived the *Monell* issue by its conduct during the trial. That is *not* what the Court of Appeals held; instead, the Court of Appeals held that the City had waived the issue by not specifically noting it in the pretrial order. [Appendix A to Petition, 13a-15a]. And, though Morro fails to acknowledge it, at trial the District Court specifically *allowed* the City to raise the *Monell* issue as a supplemental ground for its Rule 50 motion, without apparent objection by Morro. [Appendix D to Petition, 83a-84a (District Court: "I'm not faulting you for not having articulated it sooner . . . Let's renew or allow you to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final deci-

sion maker and therefore was not the City of Birmingham")]. Thus the questions presented in the Petition—rather than some intensive review of what occurred at trial—are the core of this case.

II. MORRO'S ARGUMENTS ON THE SUBSTANTIVE ISSUE OF MUNICIPAL LIABILITY ARE WITHOUT MERIT.

Finally, Morro contends that the City is liable under *Monell* for the disciplinary suspension of which he complains. The City briefly responds to this issue, so that this Court will be in a better position to grant review and decide this case without further briefing.

The unalterable fact, which requires rejection of Morro's argument, is that under applicable state and local law there is a Personnel Board which sits in review of such suspensions; indeed, it is undisputed that the Personnel Board reversed Morro's suspension and made him whole for all lost pay. [Appendix A to Petition, 4a]. Under these circumstances, where the Personnel Board can and does review decisions by the lower-level officials who impose such discipline, it is clear under this Court's precedent that the lower-level officials (whose decisions are reviewed and reviewable) are *not* "final policymakers" whose decisions will subject the municipality to liability. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion).

Morro may be suggesting that the Personnel Board could not be the City's final policymaking authority—and instead that the City is liable for the decisions of lower officials, even when those decisions are (as here) reversed by the Personnel Board—because the Personnel Board is not purely a part of the City of Birmingham but instead is empowered to review decisions by other municipalities as well. This is immaterial; it does not detract from the dispositive fact that, under state and local law, the Personnel Board has the authority to set final policy for the City of Birmingham in such matters. This Court has rec-

ognized that, in determining where final municipal policymaking authority lies, the federal courts should respect the right of state and local governments to structure their own affairs. *Praprotnik*, 485 U.S. at 126 ("[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it"). This is so, even though the Court recognized at the same time that states distribute such authority in a "rich variety" of ways. *Id.*, 485 U.S. at 124-25. Under that rule, the Personnel Board must be respected as the final policymaking authority for the City with regard to this suspension, even though the Personnel Board also has such authority with respect to some other municipalities.[1]

Morro's second argument seems to be that the Personnel Board cannot be the City's final policymaking authority with regard to his suspension because the Personnel Board's review did not precede the effective date of the suspension. This is merely an attempt to confuse the *Monell* issue of municipal liability with a flawed bit of due process theory, as though a municipality was required to offer a pre-deprivation hearing in order to avoid *respondeat superior* liability. Unsurprisingly, Morro offers no support for this novel theory. Indeed, the due process clause does not even always entitle public employees to a hearing prior to being suspended. *Gilbert v. Homar*, 117 S.Ct. 1807 (1997). Certainly then, § 1983 (which is not itself a source of individual rights) does not of its own force require municipalities to provide pre-deprivation hearings in order to avoid being held vicariously liable for the reviewable decisions of lower-level employees.

Morro's third argument seems to be that he was unfairly precluded from showing a municipal "custom" through evidence of an alleged pattern of behavior by the City's former Chief of Police. However, no number of

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[1] The District Court quoted applicable provisions of state law which give the Personnel Board the authority to review suspensions like Morro's. [Appendix B to Petition, 40a].

witnesses could have overcome the fact that Morro's suspension was *reversed* by the Personnel Board, which has final authority over such matters; this shows conclusively that the suspension was *not* the act of the City itself. Furthermore, Morro never raised any "custom" claim in his Complaint or in any pretrial order, but instead relied only on the "final policymaker" route to municipal liability. Thus this case is governed by the Court's recognition that the "final policymaker" issue is one of law, *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989), and that federal courts are "not . . . justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 126.

In short, Morro's suspension—which was *reversed* by the entity with final policymaking authority over such matters—was not the act of the City itself. Therefore the City cannot be liable under § 1983.

CONCLUSION

For the reasons stated herein, Petitioner respectfully submits that a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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